



LIBRARY OF CONGRESS

36 CFR Part 701

[Docket No. LOC 2017-1]

Library of Congress License Agreements

AGENCY: Library of Congress.

ACTION: Final rule.

SUMMARY: The Library of Congress is issuing this final rule regarding license agreements and similar agreements and instruments entered into by it. The rule will prevent the Library from potentially violating the Anti-Deficiency Act and other restrictions under Federal law, preserve the Library's rights under copyright law in regard to electronic resources and software, and streamline the Library's contracting and collections acquisitions processes for these electronic resources and software.

DATES: Effective [INSERT DATE OF PUBLICATION IN FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Pugh, General Counsel, Office of the General Counsel, Library of Congress, Washington, D.C. 20540-1050. Telephone No. (202) 707-6316.

SUPPLEMENTARY INFORMATION: The Librarian of Congress is authorized to make regulations with respect to the Library of Congress (2 U.S.C. 136). Since neither the Federal Register Act nor the Administrative Procedure Act has binding effect on the legislative branch, the Library of Congress is not required to publish its regulations in the CFR. However, as the purpose of the CFR is to notify industry, general business, and the people (*Toledo, P. & W.R.R. v. Stover*, 60 F. Supp. 587 (S.D. Ill. 1945)), it is appropriate for the Library to publish those regulations which affect the rights and responsibilities of,

and restrictions on, the public. Further, 1 CFR 5.3 allows documents “in the public interest” to be published in the *Federal Register* even if they are not required to be published under the Federal Register Act and 1 CFR 5.2.

The regulation governs license agreements and similar agreements and instruments entered into by the Library of Congress. The regulation establishes terms for these agreements intended to prevent the Library from incurring obligations that would potentially violate the Anti-Deficiency Act and other restrictions imposed by Federal law, to preserve the Library’s rights under U.S., foreign, and international copyright law, and to protect the Library’s ability to make use of computer software and other materials it licenses. In addition, this regulation is intended to streamline the contracting and collections acquisitions processes for the Library and for licensors by enabling the Library to avoid the need to negotiate specific terms addressing these matters in each license agreement into which it enters.

List of Subjects in 36 CFR Part 701

Libraries, Government contracts, Government procurement.

Final regulation

For the reasons set forth in the preamble, the Library of Congress amends 36 CFR part 701 as follows:

PART 701—PROCEDURES AND SERVICES

1. The authority citation for part 701 continues to read:

Authority: 2 U.S.C. 136; 18 U.S.C. 1017.

2. Add §701.7 to read as follows:

§701.7 Certain terms in license agreements.

(a) *Definitions.* (1) Computer software has the meaning provided in 48 CFR 2.101.

(2) License agreement means any license agreement, subscription agreement, end user license agreement (EULA), terms of service (TOS), or similar legal instrument or agreement.

(b) *Purpose.* The purpose of this part is to accommodate the Library of Congress' legal status as a Federal agency of the United States and assure that the Library of Congress, when entering into license agreements, follows applicable Federal laws and regulations, including those related to fiscal law constraints, governing law, venue, and legal representation; to preserve the Library's rights under U.S., foreign, and international copyright law; and to preserve the Library's ability to make use of computer software and other materials it licenses.

(c) *Applicability.* (1) The clauses set forth in paragraph (d) of this section are deemed to be inserted into each license agreement to which the Library of Congress is a party with the same force and effect as if set forth therein, notwithstanding any provision thereof to the contrary. In addition, the clauses in paragraph (e) of this section are deemed to be inserted into each license agreement to which the Library of Congress is a party, other than license agreements for the license of computer software to the Library of Congress, with the same force and effect as if set forth therein, notwithstanding any provision thereof to the contrary. If any term of a license agreement (at the time the license agreement is executed or as it may be amended in the future) conflicts with or imposes any additional obligations on the Library of Congress with respect to a matter

addressed by any of the clauses that are deemed to have been inserted into the license agreement as described above, the following shall apply:

(i) Such term is unenforceable against the Library of Congress unless otherwise expressly authorized by Federal law and specifically authorized under applicable Library of Congress regulations and procedures;

(ii) Neither the Library of Congress nor its employees shall be deemed to have agreed to such term by virtue of the term appearing in any license agreement;

(iii) Such term is stricken from the license agreement; and

(iv) The terms of the clauses of this section incorporated in the license agreement shall control.

(2) The Library of Congress is not bound by a license agreement unless it is entered into on behalf of the Library of Congress by a person having the authority to contract referred to in § 701.4.

(3) The Library of Congress is bound only by terms that are in writing and included in license agreements (including hard copy and electronic license agreements) entered into on behalf of the Library of Congress by a person having the authority to contract referred to in § 701.4.

(4) If any provisions are invoked through an “I agree” click box or other comparable mechanism (e.g., “click-wrap” or “browse-wrap” agreements), such provisions do not bind the Library of Congress or any Library of Congress

authorized end user to such provisions, unless agreed to on behalf of the Library of Congress by a person having the authority to contract referred to in § 701.4.

(d) *Provisions applicable to all license agreements.* The following clauses are deemed to be inserted into each license agreement to which the Library of Congress is a party:

UNAUTHORIZED OBLIGATIONS

The Library of Congress shall not be bound by any provision that may or will cause the Library of Congress or its employees to make or authorize an expenditure from, or create or authorize an obligation under, any appropriation or fund in excess of the amount available in the appropriation or fund, that would create an Anti-Deficiency Act (31 U.S.C. 1341) violation. Such provisions include, for example, automatic renewal of the agreement, penalty payments by the Library of Congress, indemnification by the Library of Congress, and payment by the Library of Congress of taxes or surcharges not specifically included in the price for the license.

LIABILITY

The liability of the Library of Congress and its obligations resulting from any breach of this agreement, or any claim arising from this agreement, shall be determined exclusively under 28 U.S.C. 1346, 28 U.S.C. 1491, or other governing Federal authority.

REPRESENTATION

The conduct of, and representation of the Library of Congress in, any litigation in which the Library of Congress is a party, or is interested, are reserved

exclusively to the United States Department of Justice as provided for in 28 U.S.C. 516.

GOVERNING LAW

This agreement shall be governed for all purposes by and construed in accordance with the Federal laws of the United States of America.

VENUE

Venue for any claim under this agreement shall lie exclusively in the Federal courts of the United States, as provided in 28 U.S.C. 1346 and 28 U.S.C. 1491. Any action commenced in a State court that is against or directed to the Library of Congress may be removed by the United States Government to Federal district court in accordance with 28 U.S.C. 1442.

DISPUTE RESOLUTION

The Library of Congress does not agree to submit to any form of binding alternative dispute resolution, including, without limitation, arbitration.

ORDER OF PRECEDENCE

Notwithstanding any provision of this agreement (including any addendum, schedule, appendix, exhibit, or other attachment to or order issued under this agreement), in the event of any conflict between the provisions of this agreement and the provisions of the clauses incorporated into this agreement pursuant to 36 CFR 701.7, the provisions of the clauses incorporated pursuant to 36 CFR 701.7 shall control.

COMMERCIAL COMPUTER SOFTWARE

As used in this clause, “commercial computer software” has the meaning provided in 48 CFR 2.101.

The provisions of the clause regarding the license of commercial computer software set forth in 48 CFR 52.227-19 are incorporated into this agreement with the same force and effect as if set forth herein, with all necessary changes deemed to have been made, such as replacing references to the Government with references to the Library of Congress.

(e) Additional provisions applicable to license agreements other than for license of computer software. In addition to the clauses deemed to be incorporated into license agreements pursuant to paragraph (d) of this section, the following clauses are deemed to be inserted into each license agreement to which the Library of Congress is a party, other than for the license of computer software to the Library of Congress:

UNAUTHORIZED USES

The Library of Congress shall not be liable for any unauthorized uses of materials licensed by the Library of Congress under this agreement by Library of Congress patrons or by unauthorized users of such materials, and any such unauthorized use shall not be deemed a material breach of this agreement.

RIGHTS UNDER COPYRIGHT LAW

The Library of Congress does not agree to any limitations on its rights (e.g., fair use, reproduction, interlibrary loan, and archiving) under the copyright laws of the United States (17 U.S.C. 101 *et seq.*), and related intellectual property

rights under foreign law, international law, treaties, conventions, and other
international agreements.

Dated: June 20, 2017.

Approved by:

Carla D. Hayden,
Librarian of Congress.

[BILLING CODE 1410-10-P]

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